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Supreme Court, U.S.
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No. 96-1326

In the

Supreme Court of the United States

October Term, 1996

HANDICABS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF OF PETITIONER

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PARTIES TO THE PROCEEDINGS

Petitioner is Handicabs, Inc. Handicabs, Inc. is a Minnesota Corporation owned in its entirety by Joyce Doerffler, with no subsidiaries.

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Petitioner Handicabs, Inc. respectfully submits the following as its reply brief:

ARGUMENT

1. Both the United States Congress and the Minnesota State legislature have found it necessary to pass laws protecting the disabled. Congress has passed the Americans with Disabilities Act ("ADA"), while Minnesota has passed the Vulnerable Adults Act ("VAA"). The ADA and the VAA attempt to empower and protect the disabled, who have had traditionally little power in society. These are people who have to face the normal challenges of life such as obtaining food, shelter, and a decent standard of living. However, the disabled must also provide for themselves in the face of daunting physical, mental, and/or emotional difficulties. Along with the elderly, these persons are the most vulnerable portion of our society. As this very case indicates, the disabled as a class are less powerful than employees, who have access to a federal agency that protects rights afforded employees. The disabled have no such assistance.

More harm than good results by allowing employees to discuss personal or company problems with Handicabs' clients. Those persons with physical impairments are often confined to wheelchairs and are physically strapped down to their van. Other employees might suffer from mental or emotional disorders. Drivers, when discussing a union or company problem, are unlikely to have the sensitivity or training to realize when the client is getting upset.[1] While employees are and should be allowed access to free speech as

[1] The evidence at the hearing indicated that in his approximately three years of employment at Handicabs, Ron Trail received two four-hour training sessions in regard to the VAA. This degree of training is clearly not comparable to that received by a nurse or doctor who might specialize in the care of the disabled.

provided by Section 7 of the NLRA, these freedoms must be reasonably curtailed when their audience consists of such captive members who are at the complete mercy of the employee. Paratransit systems are made available so that disabled persons can have access to transportation, and not to give employees an opportunity to discuss their views. A reasonably balanced view must allow the rights of the disabled to be given at least the same consideration as the rights afforded employees by the Act. The Board's Decision does not attempt to balance these rights, other than to indicate that Handicabs has a duty to protect passengers from abuse. See Pet. App at 32.

That a driver's conversation may greatly upset, but not frighten, a client, does not appear to be a consideration for the Board in this matter. See App. at A-34, 42, Resp.6-7. Handicabs' main witness, Claudia Fuglie, was visibly upset about Trail's conversations with her, a fact that the administrative law judge could not ignore. App. At A-28, 29. The administrative law judge dismissed her anger at being an unwilling party to these conversations, as mere as mere anti-union animus, despite Fuglie's good faith belief that she was statutorily entitled to be spared from listening to Trail's opinions. Id. However, the Board does concede the conversation was genuinely upsetting to Fuglie. App. at A-34.

The Board's concern is to enforce labor laws, and only labor laws. The Board would prefer to have unlimited power and discretion in the exercise of its powers. Nonetheless, it is alarming and surprising that the Board would treat Claudia Fuglie as it did, when she attempted to assert statutory rights distinct and disparate from those granted by the Act. See App. At 30. It was necessary for the Board to characterize Fuglie's compelling testimony in this manner in order to discount it. Fuglie brought these conversations to the attentions of the corporate officials because she found them

upsetting. App. at A-18; Pet. at 7-8. Absolutely nothing in the record indicates that Fuglie would have suffered adverse consequences had she not reported the incident to Handicab's officials. The Board apparently believes that she simply should have kept quiet and continued to suffer. The evidence further supports Handicabs' contention that Trail was properly discharged for violating the terms of the Vulnerable Adults Act. According to Fuglie's account, he repeatedly engaged in a conversation that: 1) she did not want to participate in; 2) which ongoing conversation could reasonably have been expected to produce mental or emotional distress, in violation of the Vulnerable Adults Act (Pet. 3.); and 3) which the Board admits caused Fuglie emotional distress. App at 34.[2] What is disturbing about the Board's Decision and Order is that it allows drivers to essentially harangue unwilling clients in regard to subjects protected by the Act.[3]

The Board questions whether Petitioner is a proper party to seek to vindicate the rights that may be accorded its passengers under either the ADA or the VAA. See Resp. 14, fn 6. The Board ignores the fact that violations of the VAA are misdemeanor violations in Minnesota. It is possible that a corporate officer could be charged if violations of the VAA within a business were widespread, and the officials failed to

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[2] The Board dismissed such apprehension as that shared generally by all passengers on any form of transportation employing represented employees. However, in the Twin Cities, Metro Mobility is the only transportation option available to the severely disabled, whereas non-disabled persons would have many more options available to them if their preferred mode of transportation was subject to a strike.

[3] Fuglie testified on several occasions that she did not want to hear Trail's discussions about the union. See App. At A-29. She testified that Trail talked to her about union matters three or four times a week during the summer and fall. App at A-28. If Ms. Fuglie's testimony is afforded credence, it becomes obvious why Ms. Fuglie appeared to be so bitter about Trail and the union.

act to stop the violations. The Board also ignores the fact that ATE Management Company was forced to pay in excess of a million dollars and leave Metro Mobility as a result of the settlement of a class action law suit based on the ADA. Pet. 4-5. This settlement occurred a mere two months prior to the time when Trail first commenced driving Ms. Fuglie. Id. Handicabs has an absolute right to comply with state and federal statutes as written, both to protect its clients and to protect itself from civil or criminal liability for failure to protect its clients. In addition, Fuglie filed an amicus brief in the Court below.

2. Handicab's rules, if read in context, are clearly intended to prevent employees from discussing personal or company problems while actually transporting customers. Appendix 2 states that: 1) Discussion of company problems with clients would be grounds for dismissal; 2) that retarded clients must not be left outside on their own; 3) that clients must not be teased, cursed or profaned; 4) that no improper monies should be taken from clients; 5) that sexual discussions or acts with clients are allowed; and 6) no personal or company problems should be discussed with clients. Pet. 6-7. The Board found that this last rule "is worded so broadly that it potentially prevents employees from publicizing any aspect of a labor dispute with [Handicabs], and from appealing for support from the public, for fear that a single client may come to feel threatened or uncomfortable." App. at 34. The Board must look at the context in which such rules are drafted, and the manner in which they are enforced. See Pet.13-14; *Aroostook County v. NLRB*, 81 F.3rd 209 (D.C. Cir. 1996.)

Taken in context, nothing in the rule prevents an employee from discussing company problems with third persons or the press. Once at home, the disabled have the option of reading or not reading a news article about a

potential strike. Similarly, they could opt to listen or watch broadcast media. But it would be their choice. It is an altogether different matter when stuck with a driver, who in Fuglie's case, brought up the same unpleasant discussion time and time again. Handicab's rules are applied and enforced only during those times when the clients are actually being transported.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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